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Supreme Court, U.S.
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No. 01-92

IN THE

# Supreme Court of the United States

PETROCHEM INSULATION, INC.,
*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), authorized the NLRB to find that Petrochem's utterly meritless and retaliatory lawsuit, seeking treble damages against Intervenors (a group of labor organizations) and their attorneys, based upon Intervenors' governmental petitioning activities, violated the National Labor Relations Act ("NLRA") by interfering with the Section 7 right of Intervenors' member "employees" to engage in concerted activities for the purpose of mutual aid and protection?

2. Whether the Court of Appeals properly held, pursuant to *Bill Johnson's Restaurants*, that once the NLRB found an unfair labor practice, it had the authority to award Intervenors the attorneys' fees they incurred in defending against Petrochem's utterly meritless and retaliatory lawsuit because the award of such fees would, pursuant to Section 10(c) of the NLRA, "effectuate the policies" of that statute?

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## BRIEF IN OPPOSITION *

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## STATEMENT

In its Petition for a Writ of Certiorari, Petrochem portrays its lawsuit against the Intervenor unions as a well-founded attempt to protect itself against "extortion." Pet. 5. That claim, however, flies in the face of the unanimous decisions by the Ninth Circuit, the National Labor Relations Board ("NLRB" or "Board"), and the D.C. Circuit, which concluded that Petrochem's attack on Intervenors' governmental petitioning activities was not only "utterly meritless" (App. 20) but, moreover, was filed to retaliate against Intervenors for

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* This Brief in Opposition is filed on behalf of the Northern California and Northern Nevada Pipe Trades District Council 51 and its constituent Locals 62, 159, 228, 246, 342, 343, 350, 393, 442, 447, 467 and 483 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, which were parties in the court below and, therefore, are parties in this Court under Rule 12.6 of the Court's rules. This Brief supports the position being taken by Respondent, National Labor Relations Board.

their exercise of rights protected both by the First Amendment and by Section 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157. App. 16-19, 34-37, 44-46, 77. Petrochem's main contention reduces to the untenable proposition that, even though Intervenors were forced to defend against a completely meritless lawsuit (seeking treble damages) directed at *their* exercise of First Amendment rights, requiring Petitioner to reimburse Intervenors for the attorneys' fees they incurred would somehow unfairly infringe upon *Petrochem's* right to petition.

A. Based upon Intervenors' participation in various governmental proceedings, Petrochem sued not only the unions themselves, but also the *lawyer and law firm* that represented them in those proceedings, alleging that all defendants were racketeers whose petitioning activities constituted "criminal extortion." App. 4, 82 n.3, 83-84.[1] Petrochem sought treble damages under RICO rather than pursuing the traditional remedy available to it under the NLRA.[2]

The district court dismissed Petrochem's RICO complaint on the basis of well-established labor law preemption principles. The court found that Petrochem had engaged in "a

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[1] Petrochem's Statement of the Case, which is devoid of a single citation to the record, is based upon allegations contained in its various complaints, which were found to be completely unsupported. *See* App. 74-77 (district court); App. 45 (Ninth Circuit); App. 34 n.20 (NLRB).

[2] In its initial complaint Petrochem specifically alleged that Intervenors' conduct contravened Section 8(e) of the NLRA, 29 U.S.C. § 158(e). App. 4, 80. If that allegation were true, Petrochem was entitled to both injunctive and compensatory relief against Intervenors pursuant to the NLRA (*see* 29 U.S.C. §§ 158(b)(4)(A), 160(l), 187(a)) and, therefore, had no need to engage in any alleged "ambitious and extensive . . . legal investigation" to determine whether it had "a legally cognizable claim under both RICO and the antitrust statutes." Pet. 6.

radical misreading [of the case law] which vainly attempts to patch together a back-stop argument out of quotations taken out of context." App. 93 n.10.

Petrochem then sought leave to file a first amended complaint seeking punitive damages under both RICO and the antitrust laws based on the same petitioning activities by Intervenors and their attorneys. The district court denied that request and cautioned Petrochem to plead any future antitrust and RICO claims with specificity and in compliance with court rules. App. 4-5. Petrochem then filed a second amended complaint, again vaguely alleging RICO and antitrust punitive damage claims.

The district court, after noting that it had been "enormously patient" with Petrochem, and that Petrochem had been given "ample opportunities . . . to state a cognizable claim," dismissed the second amended complaint with prejudice. App. 60, 77. Noting that it had provided clear guidance to Petrochem as to how to plead both RICO and antitrust actions, App. 60, 62-63, the district court held that Petrochem had disregarded its "specific admonitions" (App. 76) and instead had filed a factually deficient amended complaint that was "no improvement" because it also relied on "[v]ague and conclusory references to unnamed co-conspirators." App. 72, 74. While Petrochem's complaint was premised on Intervenors' petitioning activity, nowhere did it allege that Intervenors (or their attorneys) "threatened or pursued *a single meritless objection* . . . much less identify that objection or allege why such objection should be considered meritless." App. 74 (emphasis added).

In dismissing Petrochem's litigation with prejudice, the district court was cognizant of Petrochem's obvious motive in pursuing its treble damage lawsuit against Intervenors and their attorneys, stating that "the continued vitality of this lawsuit would unjustifiably intrude upon defendants' right to participate in public proceedings." App. 76. The court added

that it was "mindful that the pendency of this suit, both in litigation cost and the threats of treble damages, could have the effect of chilling the defendants' rights to public participation." App. 77.[3]

B. Petrochem appealed the dismissal to the Ninth Circuit (Kozinski, Thompson, T.G. Nelson), which summarily affirmed the district court in a brief unpublished memorandum opinion. The Court of Appeals stated that because the facts alleged by Petrochem "do not at least outline or adumbrate a[n] [antitrust] violation . . . [Petrochem] get[s] nowhere by merely dressing them up in the language of antitrust." App. 45. The Court was similarly dismissive of Petrochem's RICO claims. App. 48 49.

Despite the summary and unanimous rejection of its lawsuit by both the district court and Ninth Circuit, Petrochem filed a Petition for Writ of Certiorari with this Court, which was denied. App. 27.

C. After the denial of certiorari, the NLRB applied the standard set forth by this Court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and held in a unanimous decision that Petrochem violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by litigating a lawsuit against Intervenors that was both (i) meritless and (ii) in retaliation for their having engaged in protected concerted activity on behalf of their members. App. 21-41. The D.C. Circuit (Edwards, Williams, Tatel) unanimously affirmed, "agree[ing] with the Board that describing [Petrochem's lawsuit] as meritless would be 'charitable,' " App. 15, and holding that Petrochem's "utterly meritless," retaliatory lawsuit did indeed constitute an unfair labor practice. App. 20;

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[3] The summary dismissal of Petrochem's three complaints is in stark contrast to the hypothetical lawsuit posed by Petitioner in which there is "a hotly contested trial, months in duration . . . ultimately resolved in favor of the Unions by the closest of margins." Pet. 20-21.

*see also* App. 15 (lawsuit had "absolutely no merit"), *id.* ("completely without merit"). Although Petrochem petitioned for en banc review, no judge voted to rehear the case.

## REASONS FOR DENYING THE WRIT

The decision below does not merit review under any of this Court's usual criteria.

*First*, the Court of Appeals' decision did not break any new legal ground. Rather, when reviewing the Board's determination that Petrochem's lawsuit constituted an unfair labor practice which warranted the normal remedial order, the D.C. Circuit simply applied the principles established by this Court's unanimous decision in *Bill Johnson's*.

*Second*, despite Petrochem's claim to the contrary, Pet. 15-16, there is no conflict among the circuits regarding the meaning or application of *Bill Johnson's* in the factual context presented by this Petition.

*Third*, notwithstanding the considerable hyperbole in the Petition, the Board's order requiring Petrochem to pay the attorneys' fees incurred by the targets of its meritless, retaliatory lawsuit does not raise a serious First Amendment issue.

### A. THE BOARD AND D.C. CIRCUIT APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES.

1. Petrochem claims that the clear language in *Bill Johnson's* relied upon by the NLRB and the Court of Appeals was "unthinking" *dicta* by this Court that was implicitly rejected in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993). The Board and the D.C. Circuit properly rejected that contention.

In *Bill Johnson's*, this Court accommodated the employer unfair labor practice provisions of the NLRA with an employer's First Amendment right to petition the government. While the Court acknowledged that an employer has

the right to access the courts by filing a lawsuit, it also recognized that such litigation can be a "powerful instrument of coercion or retaliation" with regard to rights protected by the NLRA because even a meritless lawsuit requires the defendant "to retain counsel and incur substantial legal expenses," and this financial threat is exacerbated "where the complaint seeks damages in addition to injunctive relief." 461 U.S. at 740-41.

The Court accommodated the competing rights of employers and their employees by establishing two different tests for determining whether an employer's lawsuit constitutes an unfair labor practice. It held that a *pending* lawsuit can be *enjoined* as an unfair labor practice only if it is *baseless*. *Id.* at 744. A different standard, however, is applicable to a *completed* lawsuit "[i]f judgment goes against the employer . . . or [the law suit] is otherwise shown to be *without merit*." *Id.* at 747 (emphasis added). As the Court reiterated at the conclusion of its opinion:

> *If the . . . proceedings result in a judgment adverse to the plaintiff*, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.

*Id.* at 749. (emphasis added).[4] The Courts of Appeals have consistently found that *Bill Johnson's* means what it says, and have applied its two-pronged post-adjudication standard of "meritless" and "retalitatory." *See, e.g., BE&K Constr. Co. v.*

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[4] In explaining the post-adjudication standard, the Court noted that "the employer has had its day in court." *Id.* at 747. That statement belies Petrochem's contention that "the Court addressed only the state's interest" in determining whether an adjudicated lawsuit constitutes an unfair labor practice, and ignored First Amendment considerations. Pet. 12. *See Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 243 (6th Cir. 1995) (noting that once the employer's suit has been adjudicated, "the First Amendment interest has been satisfied because the employer has had its day in court").

*NLRB*, 246 F.3d 619, 629 (6th Cir. 2001); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *Johnson & Hardin Co.*, 49 F.3d at 237; *NLRB v. Vanguard Tours*, 981 F.2d 62, 65 (2d Cir. 1992); *NLRB v. International Union of Operating Engineers*, 15 F.3d 677, 679 (7th Cir. 1994); *see also White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000); *Cardtoons v. Major League Baseball Players Ass'n.*, 208 F.3d 885, 887 n.4 (10th Cir.) (*en banc*), *cert. denied*, 531 U.S. 873 (2000).

Articulation of the post-adjudication standard was necessary to the decision in *Bill Johnson's* because the Court had to establish the correct standard for the NLRB to apply, on remand, to the employer's state court lawsuit. As the Court explained, "If [the employer's] other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose." *Bill Johnson's*, 461 U.S. at 749 n.15; *see also id.* at 736 n.3.

Nor was the Court's determination of the post-adjudication standard "unthinking." *See* Pet. 15. The briefs before the Court in *Bill Johnson's* discussed the *Noerr-Pennington* antitrust standard,[5] and the similarities and differences between the antitrust and labor contexts. *See* Respondent's Br. in No. 81-2257 at 31-33 & n.2; Petitioner's Reply Br. in No. 81-2257 at 10-11. And during the oral argument in *Bill Johnson's*, the Court repeatedly questioned counsel about how the standard for reviewing a retaliatory lawsuit *after* it had been adjudicated should vary from that used when

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[5] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

deciding whether to *enjoin* such a lawsuit. *See* Oral Arg. Tr. at 7, 19, 20, 44, 45 in No. 81-2257. The Court's opinion adopted the antitrust standard for determining whether a pending lawsuit could be enjoined as an unfair labor practice, 461 U.S. at 744, but established a different standard for determining whether an adjudicated lawsuit violates the NLRA.

*Professional Real Estate Investors* did not reject the post-adjudication standard that *Bill Johnson's* established for determining, in the *labor* context, whether a lawsuit constitutes an unfair labor practice. Rather, *Professional Real Estate* simply "define[d] the 'sham' exception to the doctrine of *antitrust* immunity first identified in [*Noerr*]." 508 U.S. at 51 (emphasis added). The Court clarified that under its long-standing precedent there cannot be *antitrust treble damage liability* for the filing of a lawsuit that is not "objectively baseless." *Id.* at 60-61; *see BE&K Constr. Co.*, 246 F. 3d at 629 ("decision . . . involved only . . . immunity from *antitrust* liability."). And since *Professional Real Estate*, the Courts of Appeals have continued to apply the *Bill Johnson's* post-adjudication standard to determine whether a lawsuit violates the NLRA. *See Petrochem*, 240 F.3d at 31-32; *BE&K Constr. Co.*, 246 F.3d at 629; *Diamond Walnut Growers*, 53 F.3d at 1088; *Johnson & Hardin*, 49 F.3d at 243; *International Union of Operating Engineers*, 15 F.3d at 679.[6]

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[6] This Court's different accommodations between the antitrust laws and the First Amendment on the one hand (*Professional Real Estate*), and between the NLRA and the First Amendment on the other (*Bill Johnson's*), reflect that antitrust and labor law are two entirely distinct statutory schemes, with different purposes and remedies. *White*, 227 F.3d at 1236-37; *Cardtoons*, 208 F.3d at 888-90 & n.4. The potential liability for having brought an unsuccessful lawsuit is far greater when the antitrust laws are invoked (*i.e.*, treble damages) than when an unfair labor practice is alleged (*i.e.*, attorneys' fees). *See* James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985). Moreover, the potential "chilling

2. The Board and the Court of Appeals also applied settled law in rejecting Petrochem's claim that its meritless and retaliatory lawsuit could not have violated the NLRA because it sued labor unions, rather than "employees." Petrochem relies upon a single sentence in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which did not announce the sweeping revision of existing law that Petrochem attributes to it. The only issue in *Lechmere* was whether an employer, who denies union organizers access to its private property, violates the Act by interfering with the Section 7 right of *its* employees to engage in "self-organization." *See* 502 U.S. at 531-32. It was in that context that this Court stated: "the NLRA confers rights only on *employees*, not on unions or their non-employee organizers." *Id.* at 532.

That statement, however, does not support Petrochem's claim that Intervenors had no "standing" to invoke Section 7 protections on behalf of their members, who are "employees." Section 7 also affords "employees" the right to "form, join, or assist labor organizations . . . for the purpose of . . . mutual aid or protection." To permit an employer, like Petrochem, to retaliate with impunity against a union for engaging, on behalf of its members, in such mutual aid and protection

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effect of a . . . lawsuit upon an employee's willingness to engage in protected activity" exists only in the labor context. *Bill Johnson's*, 461 U.S. at 741. Finally, an employer's right to bring a lawsuit must be balanced against the First Amendment protected associational rights of employees; no such countervailing right exists in the antitrust context. *See White*, 227 F.3d at 1237.

Because "no reasonable litigant could realistically [have] expect[ed] success on the merits" by filing the utterly meritless complaints that Petrochem filed, its lawsuit would constitute an unfair labor practice if one applied *Professional Real Estate's* objectively baseless standard. 508 U.S. at 60. Accordingly, any alleged conflict between *Bill Johnson's* and *Professional Real Estate* regarding the proper standard for determining whether an adjudicated lawsuit constitutes an unfair labor practice, is irrelevant to the ultimate outcome of this case.

as governmental petitioning activities, would impair the Section 7 associational rights of the union's member "employees" by denying them the means to engage effectively in concerted actions protected by the NLRA. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Geske & Sons v. NLRB*, 103 F.3d 1366, 1377, 1378 n.16 (7th Cir. 1997); *Diamond Walnut Growers*, 53 F.3d at 1089-90.[7]

In *Lechmere*, after the statement quoted above that Petrochem relies upon, this Court went on specifically to note that an employer's actions against a union *can* violate the NLRA. *See id.* at 537; *accord, Thunder Basin Coal v. Reich*, 510 U.S. 200, 217 n.21 (1994). As the D.C. Circuit stated in this case, "we cannot imagine a more reasonable interpretation" of the Act (App. 7); and since *Lechmere*, the Board and Courts of Appeals have continued to find that various employer conduct, directed at labor organizations, is violative of the NLRA. *See, e.g., BE&K Constr. Co.*, 246 F.3d at 627, *enf'g* 329 NLRB No. 68 (1999); *Geske & Sons,* 103 F.3d at 1377, *enf'g* 317 NLRB 28 (1995); *Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996), *enf'g* 318 NLRB 433 (1995); *O'Neil's Markets v. NLRB,* 95 F.3d 733, 739 (8th Cir. 1996), *enf'g in relevant part* 318 NLRB 646 (1995); *Diamond Walnut Growers*, 53 F.3d at 1089-90, *enf'g* 312 NLRB 61(1993).[8]

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[7] Intervenors' governmental petitioning activities were designed to "expand union job opportunities for current union members . . . [and] improve their ability to bargain for higher wages. . . ." App. 8-9.

[8] The Board and the D.C. Circuit also properly rejected Petrochem's suggestion that it could not have violated the NLRA because it did not sue "a union representing *its* employees." Pet. 24 (emphasis added). Section 2(3) of the Act, 29 U.S.C. §152(3), defines an "employee" to include "any employee, and shall not be limited to the employees of a particular employer." *See, e.g., Eastex, Inc., v. NLRB*, 437 U.S. 556, 564 (1978); *see also*, 29 U.S.C. § 152(9) (definition of "labor dispute"); 29 U.S.C. § 113(c) (same). Since Section 8(a)(1) of the Act prohibits "employers" from interfering with the rights of "employees," the statute on its face

3. Finally, the D.C. Circuit did not break any new ground in properly rejecting Petrochem's claim that the Board's award of attorneys' fees to Intervenors should not have been controlled by this Court's decision in *Bill Johnson's* (which is directly on point), but instead by two cases decided *prior* to it (which are not on point). *See Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 721 (1982) (involving 29 U.S.C. § 187, rather than 29 U.S.C. § 160(c)); and *J.P. Stevens & Co.*, 244 NLRB 407 (1979), *enf'd*, 668 F.2d 767 (4th Cir.), *vacated and remanded*, 458 U.S. 1118 (1982) (involving an award of attorneys' fees incurred in Board proceedings, rather than fees (as in this case) incurred in defending a lawsuit which itself *constituted the unfair labor practice*). Neither the Board nor the Courts of Appeals have interpreted either of those cases in the manner urged by Petrochem. *See e.g.*, *BE&K Constr. Co.*, 246 F.3d at 631, *enf'g* 329 NLRB No. 68 at 11-12 (1999); *Petrochem*, 240 F.3d at 35, *enf'g* 330 NLRB No.10 at 5 n.27 (1999); *Geske & Sons*,103 F.3d at 1378-79; *Gibson Greeting, Inc. v. NLRB*, 53 F.3d 385, 394 (D.C. Cir. 1995).

## B. THERE IS NO CONFLICT AMONG THE CIRCUITS.

*Vanguard Tours,* the sole case cited by Petrochem as evidencing a circuit split on an issue presented by its Petition, actually interprets the *Bill Johnson's* post-adjudication standard consistently with every other court: "If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing suit—the Board may consider the filing of the suit to have been an unfair labor practice." 981 F.2d at 65. While

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makes clear that an employer, such as Petrochem, can violate the NLRA by interfering with the Section 7 rights of any "employees," including those who do not work for it. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 511 n.3 (1976); *BE&K Constr. Co.*, 246 F.3d at 626-27; *O'Neil's Markets*, 95 F.3d at 737.

*Vanguard Tours* does question whether suits which are *voluntarily withdrawn* should be viewed as "without merit" pursuant to *Bill Johnson's*, *id.* at 66, that portion of the opinion is not relevant to this Petition since Petrochem's lawsuit was not withdrawn but was decided on the merits by both the district court and the Ninth Circuit.

### C. ORDERING PETROCHEM TO PAY ATTORNEYS' FEES DOES NOT RAISE A SERIOUS FIRST AMENDMENT ISSUE.

1. Petrochem claims that the *Bill Johnson's* post-adjudication standard "completely remove[s] all First Amendment protections ... in any case brought by the employer against employees or a labor organization, unless the employer prevails in the lawsuit" and, therefore, "under the NLRA ... the First Amendment right to petition is diminished almost to the point of non-existence." Pet. 9; *see also* Pet. 21 ("It is hard to imagine a standard which would more certainly and thoroughly chill the employer's First Amendment right to petition, unless it were a standard that made *all* lawsuits against unions a violation of the Act."). These statements—which suggest an automatic rule that a meritless employer lawsuit violates the Act—totally ignore the second prong of the *Bill Johnson's* post-adjudication standard, *viz.* that a lawsuit can constitute an unfair labor practice *only* if the Board, and the reviewing Court of Appeals, also conclude "that [it] was filed with *retaliatory intent.*" *Bill Johnson's*, 461 U.S. at 749 (emphasis added). In this case, both the Board and the D.C. Circuit found (and Petrochem does not challenge that finding) that Petitioner's lawsuit was filed to retaliate against Intervenors for engaging in protected concerted activities on behalf of their members. App. 13-19; App. 34-37.

2. Finally, Petrochem's claim that the decision below "essentially abrogate[d] the American Rule," Pet. 28, reflects Petitioner's fundamental misunderstanding of the remedy

ordered by the NLRB. The NLRA authorizes the Board to order any proper relief that would "effectuate the policies of [the Act]." *Bill Johnson's*, 461 U.S. at 747 (citing 29 U.S.C. §160(c)). In *Bill Johnson's*, this Court held that once a violation of the Act has been found, "the Board may order the employer to reimburse the [parties] whom he had wrongfully sued *for their attorney's fees and other expenses.*" 461 U.S. at 747 (emphasis added). Only an award of attorneys' fees can remedy the unfair labor practice and act as a deterrent to the filing of additional meritless, retaliatory lawsuits. *See BE&K Constr. Co.*, 246 F.3d at 632. As the D.C. Circuit explained, "the fee award in no way conflicts with the American rule because the award responds not to the company's loss of its suit, but to the fact that the suit itself amounted to an 'illegal act.'" App. 20. In any event, requiring a party to pay attorneys' fees is hardly a novel remedy; and the American Rule, which is not based on the Constitution, has been altered by numerous statutes. *See, e.g.*, 29 U.S.C. § 107(e) (requiring payment of union's attorneys' fees if employer does not prevail in request for injunctive relief).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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